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Supreme Court of the United States

OCTOBER TERM, 1967

No. 302

REDERI A/B DISA,

Petitioner,

—against—

CUNARD STEAMSHIP COMPANY, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition

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Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

BERNARDO PENORO,

Plaintiff,

—against—

REDERI A/B DISA and vessel DISA, her motors, engines, boilers, gear and tackles,

Defendants.

REDERI A/B DISA,

Defendant and Third-Party Plaintiff-Petitioner,

—against—

CUNARD STEAMSHIP COMPANY, LTD.,

Third-Party Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the dismissal of petitioner's appeal to the United States Court of Appeals for the Second Circuit on April 3, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at F. 2d . The opinion of the District Court is not officially reported. Both opinions are reprinted in the appendix hereto.

JURISDICTION

The opinion of the Court of Appeals was entered on April 3, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Has the unification of civil and admiralty procedure made an order staying an admiralty suit pending arbitration just as appealable as an identical order in a civil action has always been?

STATUTE INVOLVED

The only statute involved is 28 U. S. C. § 1292(a)(1) dealing with the jurisdiction of the Courts of Appeals from interlocutory orders of the District Courts.

STATEMENT OF THE CASE

This suit was commenced by plaintiff, a longshoreman, against petitioner, Rederi A/B Disa, a Swedish shipowner, to recover $100,000 damages for injuries, which he sustained on October 14, 1963, while in the employ of respondent, Cunard Steamship Co., Ltd. At the time of the accident, plaintiff was asisting in the discharge of cargo from petitioner's m/v Disa, which was then moored to Pier 51, North River, New York.

In addition to employing plaintiff, Cunard Steamship Co., Ltd. was also the charterer of the m/v Disa under the terms of a standard Baltime Charter. Thus, at all material times Cunard acted in two separate and distinct capacities—that of stevedore and that of charterer.

Pursuant to order of the District Court, Cunard Steamship Co., Ltd. was impleaded as a third-party into this suit under the doctrine of *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation,* 350 U. S. 124 (1956). The third-party complaint alleges not a breach of the charter party but a breach of the stevedore's implied warranty of workmanlike service.

Subsequently, Cunard moved for an order dismissing the third-party complaint or, in the alternative, staying petitioner from the prosecution of the third-party complaint pending arbitration in London. This alternate request for relief was based on Cunard's contention that petitioners *Ryan* indemnity claim somehow constituted a "dispute arising under the charter" and, therefore, subject to compulsory arbitration.

In a memorandum opinion, dated July 5, 1966, the District Court granted the requested stay of the third-party action and an order, embodying this determination, was filed and entered in the District Court on July 12, 1966.

Petitioner sought a direct appeal of the order granting the stay under 28 U. S. C. § 1292(a)(1) on the ground that, since the unification of civil and admiralty procedures, the grant or denial of a stay of an action pending arbitration was now just as appealable in an action commenced in admiralty as an identical order issued in an action commenced on the civil side of the Court.[1]

While indicating its disagreement with the District Court on the merits, the Court of Appeals for the Second Circuit, in an opinion dated April 3, 1967, granted respondent's motion to dismiss the appeal on the authority of *Schoenamsgruber* v. *Hamburg American Line,* 294 U. S. 454 (1935).

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[1]Upon reargument in the District Court, the issue was certified for appeal under 28 U. S. C. § 1292(b) but the Court of Appeals thereafter declined to hear it.

REASON FOR GRANTING THE WRIT

(1) An Important Question of Federal Procedure.

Title 28 U. S. C. § 1292(a)(1) provides, in pertinent part, as follows:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, * * * *, or of the Judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * *"

The jurisdiction of the Courts of Appeals under this section is quite properly determined by this Court, *Switzerland Cheese Association, Inc.* v. *Horne's Market, Inc.*, 385 U. S. 23 (1966).

(2) The Holding of the Court of Appeals is Contrary to this Court's Order of July 1, 1966, Effecting Unification of Civil and Admiralty Procedures.

Under 28 U. S. C. § 1292(a)(1) and its predecessor an appeal will lie from an order granting or denying a stay of an action at law pending determination of an equitable defense or counterclaim, *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379 (1935); *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188 (1942). Where the original claim was equitable, however, the order was held to be non-appealable, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955). The history and reasoning behind this distinction is traced in the opinion of the Court below (A. 1a-12a).

On the authority of *Enelow,* this Court specifically held appealable an order granting or denying a stay of an action at law, pending arbitration, *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449 (1935). As in *Enelow,* the Court equated such an order to the grant or denial of an injunction.

When the order granting a stay pending arbitration was entered in admiralty, however, a different result was reached, *Schoenamsgruber* v. *Hamburg American Line,* 294 U. S. 454 (1935). In holding such order to be non-appealable, the Court stated, 294 U. S. at 457:

> "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

According to Professor Moore, the question of appealability of these orders depended on whether the action was one governed by the Federal Rules of Civil Procedure, 6 Moore, Fed. Prac. (2d Ed., 1965) § 54.07, p. 47. The treatise then summarized the distinction:

> "* * * As we have seen, the *Enelow* doctrine does not apply in admiralty, since the admiralty court has no general power to grant or deny injunctions, and hence an interlocutory order, made in an admiralty proceeding, which grants or denies a stay pending arbitration is non-appealable. But the *Enelow* doctrine does apply in actions at 'law,' so that an order staying or refusing to stay an action at law pending arbitration is appealable as an order granting or denying an interlocutory injunction." *Ibid*

Appealability, therefore, hinged on the wholly procedural question of whether the action was on the civil side of the Court, applying the Federal Rules of Civil Procedure including the injunctive power of Rule 65, or in admiralty, where such injunctive power was lacking.

With the amendment to the Federal Rules of Civil Procedure, effective July 1, 1966, civil actions and suits in admiralty were brought into procedural harmony. According to the Advisory Committee's Notes of 1966 on the reasons for recission of the admiralty rules, comment (c):

> "The amendments to the Federal Rules of Civil Procedure *to unify the civil and admiralty procedure,* together with the proposed Supplemental Rules for Certain Admiralty and Maritime Claims, completely supersede the Admiralty Rules. Accordingly, the latter are rescinded." (Emphasis added)

The effect of this merger is noted in Moore's Federal Practice Rules Pamphlet (1966) comment on Rule 1 at p. 202:

> "* * * What is accomplished is the elimination of a separate set of rules in admiralty actions which sometimes merely reiterated the Civil Rules, and yet in other instances, did not afford advances in practice characteristic of the Civil Rules."

Since the amended rules were specifically made applicable to future proceedings in pending litigation[2] it follows that the injunctive power of Rule 65, previously denied to admiralty courts, is now as readily available in this case as in any civil action. Consequently, the sole pro-

[2]Order of United States Supreme Court, February 28, 1966.

cedural obstacle to an appeal under 28 U. S. C. § 1292(a)(1)—lack of injunctive power—has been removed. Further, since the indemnity suit herein seeks only money damages, it would not have been cognizable in equity rendering the stay unappealable, see *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 184 (1955).

In the permanent edition of his treatise, Professor Moore acknowledged that in determining the appealability of a stay order it was necessary to analyze whether: (1) it was issued in the course of an admiralty suit, or (2) it was issued in an action formerly cognizable in equity since, in either case, the order would be non-appealable, 6 Moore's Fed. Prac. (2d Ed., 1965) § 54.07. Significantly, Moore's Federal Practice Rules Pamphlet (1966) at pages 213-214, following the unification of civil and admiralty procedure, no longer recommends analysis of whether the stay order was issued in an admiralty suit; only the law-equity distinction is preserved.

Petitioner respectfully submits that an appeal under 28 U. S. C. § 1292(a)(1) of the District Court order staying the third-party action herein would be in keeping with the intent of this Court to achieve procedural harmony in Federal litigation. To permit such an appeal would in no way delay plaintiff's action since his application for a preference in the District Court was not opposed by petitioner and was granted. The outstanding effect of an immediate appeal would be a salutory one—the elimination of a procedural marathon consisting of trial and possible appeal of plaintiff's claim in American Courts, followed by arbitration and possible appeal in the English courts and then a return to the Courts of this country for prosecution of the indemnity claim—all as envisioned by the Court below.

Petitioner submits that the relief requested herein would open no floodgate of appeals, *Switzerland Cheese Associa-*

tion, Inc. v. *Horne's Market, Inc.*, 385 U. S. 23 (1966), but would serve to advance the cause of harmony in Federal litigation and insure to all the right to have their claims adjudicated by the proper tribunal, *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956).

The unification of civil and admiralty procedure is a recent innovation in Federal law. It is urgent, therefore, that procedural anomalies, which existed previously, be corrected as quickly as possible lest the mere passage of time perpetuate the type of incongruity which satisfied neither the majority nor dissent in *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955). In this regard, petitioner emphasizes that there is no suggestion that this Court judicially legislate a change in 28 U. S. C. § 1292(a)(1). Rather, petitioner urges that, since unification, the sole procedural obstacle to appellate jurisdiction has been removed leaving the way clear for this Court to achieve at least one of the purposes of unification.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

June , 1967.

Respectfully submitted,

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APPENDIX

[1777] UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 345—September Term, 1966.

(Argued February 24, 1967 Decided April 3, 1967.)

Docket No. 30911

BERNARDO PENORO,

Plaintiff,

—v.—

REDERI A/B DISA and vessel DISA, her motors, engines, boilers, gear and tackles,

Defendants.

REDERI A/B DISA,

Defendant and Third Party Plaintiff-Appellant,

—v.—

CUNARD STEAMSHIP COMPANY, LTD.,

Third Party Defendant-Appellee.

Before:

FRIENDLY, ANDERSON and FEINBERG,

Circuit Judges.

[1778] Rederi A/B Disa appeals, under 28 U. S. C. § 1292(a)(1), from an interlocutory order granting a stay of its impleading action against Cunard Steamship Company, Ltd. pending arbitration, entered in the United States

Appendix

District Court for the Southern District of New York, Thomas F. Murphy, *Judge*. Appeal dismissed.

WILLIAM P. KAIN, JR., Esq., New York, N. Y. (Haight, Gardner, Poor & Havens and Thomas F. Molanphy, Esq., New York, N. Y., on the brief), *for Defendant and Third Party Plaintiff-Appellant.*

JOHN W. CASTLES, 3d, Esq., New York, N. Y. (Lord, Day & Lord, William J. Brennan, Esq., and Roger C. Ravel, Esq., New York, N. Y., on the brief), *for Third Party Defendant-Appellee.*

ANDERSON, *Circuit Judge*:

On October 14, 1963, Bernardo Penoro, a longshoreman employed by appellee, Cunard Steamship Company, Ltd., was seriously injured while unloading a ship owned by appellant, Rederi A/B Disa, in New York harbor. On May 15, 1964, Penoro commenced suit for $100,000 against Rederi as shipowner. On June 23, 1965, Rederi, alleging that Penoro's injuries had been caused by the fault of Cunard, moved to implead Cunard as a third party defendant on the ground that *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956) entitled appellant to indemnity from appellee for any liability appellant might have to Penoro. In *Ryan* the Supreme Court held [1779] that a shipowner has a right of indemnity to recover from a stevedore the amount of judgment which the shipowner was required to pay to one of the stevedore's employees for injuries incurred on its vessel but caused by the fault of the stevedore; the stevedore was said to have breached an "implied warranty of workmanlike service."

Appendix

On March 23, 1966, appellee stevedore moved in the trial court for a dismissal of the third party idemnity action or in the alternative for a stay from the prosecution of that action pending arbitration.[1] The crux of appellee's motion was the somewhat unusual circumstance that at the time of the injury of its employee Cunard was not only the stevedore but also the charter of the ship. Under the time charter between Rederi and Cunard, entered into on April 10, 1963, Cunard, as the charterer, was responsible for arranging and paying for the loading and unloading of the vessel;[2] and Cunard had elected to do its own stevedoring in New York. The time charter also provided that any dispute between the shipowner and charterer, arising under the charter, would be referred to arbitration.[3] The issue presented was whether or not Rederi's *Ryan* indemnity action against Cunard, as stevedore, was subject to the [1780] arbitration agreement in which Cunard is described only as charterer.

In the court below appellant contended that its *Ryan* action was independent of the charter, and that the holding

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[1]Authority for district courts to stay proceedings pending arbitration is provided in 9 U. S. C. § 3.

[2]Clause 4 of the Charter provides:

"Whilst on hire the Charterers to . . . arrange and pay for loading, trimming, stowing . . . , unloading, weighing, tallying and delivery of cargoes. . . ."

[3]Clause 23 of the Charter provides:

"Any dispute arising under the Charter to be referred to arbitration in London one arbitrator to be nominated by the Owners and the other by the Charterers, and in the case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or Umpire to be final and binding upon both parties."

in that case provided it with a right to indemnity from Cunard *as stevedore* wholly apart from the charter and from Cunard's status as charterer; that, in fact, *as charterer* Cunard was not subject to any duty of indemnity under the *Ryan* doctrine;[4] and that consequently the *Ryan* action did not "arise under" the charter. Cunard, on the other hand, claimed that a stevedore's implied warranty under Ryan must inhere in some contract made by the stevedore.[5] It argues that here the stevedore had made no contract with the charterer, because they were in fact the same person, and the only contract the stevedore had made with the shipowner was the time charter, which it had made in its capacity of charterer. Cunard asserts that any *Ryan* implied warranty therefore must inhere in, i.e. "arise under," the time charter and fall within the scope of the arbitration clause.[6]

[1781] The trial court apparently adopted Cunard's theory of the case and on July 5, 1966, decided the issue

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[4] *McNamara* v. *Weichsel Dampfschifffahrts A. G. Kiel Germany*, 339 F. 2d 475, 478 (2 Cir. 1964); *D/S Ove Skou* v. *Herbert*, 365 F. 2d 341, 351 (5 Cir. 1966).

[5] In *Ryan* the stevedore had a contract with the shipowner; however, the Court was quick to apply *Ryan* where the stevedore's contract was with someone other than the shipowner. In *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959), the stevedore had contracted with the charterer. The Court held that the stevedore's implied warranty of workmanlike service was for the benefit of the ship; therefore, the shipowner could recover indemnity from the stevedore as third party beneficiary. See also *Waterman SS Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421 (1960) [stevedore contract with cargo consignee].

[6] While Cunard argued here and below that its *Ryan* obligations arise under the charter, there is some indication in its brief that, before the arbitrators in London, it will speak another language and argue that *Ryan* as American law has no application to a time charter entered in England.

in its favor.[7] Rederi's action was not dismissed but was ordered stayed pending arbitration pursuant to the charter. Rederi now seeks review, under 28 U. S. C. § 1292(a)(1), of the interlocutory order granting the stay.[8] Cunard moves

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[7]While there is no doubt that the basis of *Ryan* is contract rather than tort, *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U. S. 315 (1964), the trial court's concept of "contract" for *Ryan* purposes —that there could be no contract other than the time charter—is an extremely narrow one and is apparently in conflict with what we said in *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421, 425 (2 Cir. 1962):

> "The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship, by virtue of which he may be held vicariously liable for injuries caused by hazards which the longshoremen either created or had the primary responsibility or opportunity to eliminate or avoid. . . . The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved. . . . Thus while the cases speak in the language of contract, it is misleading to cling to the literal implications of that language. The scope of the stevedore's warranty of workmanlike performance is to be measured by the relationship which brings it into being. Since the shipowner here was held liable for injuries the jury found were the foreseeable result of the stevedores' failure to perform in a workmanlike fashion, it may recover indemnification, whether it was strictly a 'third-party beneficiary' or not. . . ."

at 425-426. See also *Williams* v. *Pennsylvania R. R.*, 313 F. 2d 203, 212 (2 Cir. 1963); *Rogers* v. *United States Lines Co.*, 303 F. 2d 295 (3 Cir. 1962). The cases cited by the court below, *Giuffre* v. *The Magdalene Vinnen*, 152 F. Supp. 123 (E. D. N. Y. 1957); *Greene Steel & Wire Co.* v. *F. W. Hartmann & Co.*, 235 N. Y. S. 2d 238 (Sup. Ct. 1962), *aff'd*, 247 N. Y. S. 2d 1008 (App. Div.), *leave to appeal denied*, 249 N. Y. S. 2d 886 (Ct. App. 1964), are not directly applicable since they did not involve claims based on the *Ryan* implied warranty doctrine.

[8]Appellant earlier sought a discretionary interlocutory appeal under 28 U. S. C. § 1292(b). Leave to appeal under § 1292(b) was denied by this court on September 7, 1966.

APPE

ENDIX

to dismiss the appeal on the ground that § 1292(a)(1) does not apply. We grant the motion.

[1782] Section 1292(a)(1) provides:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . ."

Whether or not a stay of court proceedings is an "injunction" within the meaning of § 1292(a)(1) has depended on what proceedings are stayed by what court. The general principle is that where a court stays a proceeding *on its own docket,* that is not an injunction but merely a calendar order issued under the court's inherent power to regulate the administration of its own business. On the other hand, where a court stays a proceeding *in another court,* that stay is considered to be an injunction. Traditionally, only a court of equity could stay proceedings in another court.

In *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379 (1935), the Supreme Court first considered the problem of stays of court proceedings under Title 28 U. S. C. § 129, predecessor to § 1292(a)(1). There the trial court had granted defendant's petition to try his *equitable defense* before trying plaintiff's *action at law.* Although there was only one court involved, the Supreme Court treated the court as consisting of two separate "sides" and held that the equity side of the court had enjoined the law side. The order was therefore appealable. In *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,*

293 U. S. 449 (1935), decided the same day, defendant in a suit on a contract pleaded an exclusive arbitration clause in the contract; the court denied a stay of the con- [1783] tract action pending arbitration. The Supreme Court held that the issue of the arbitration clause raised an equitable defense and that the order denying the stay was appealable under *Enelow,* which the Court interpreted as holding,

> "[A]n order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law . . . is appealable under [present 1292(a)(1)] . . ."

293 U. S. at 452.

Enelow was decided shortly before the unification of law and equity under the Federal Rules of Civil Procedure, and it might have been thought that this unificaion would have spelled the end for *Enelow's* "two sides" approach to § 1292(a)(1). Indeed, that was the position of this court in *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corp.,* 124 F. 2d 563 (2 Cir. 1942). The Supreme Court, however, reaffirmed *Enelow,* on virtually the same facts, in *Ettelson* v. *Metropolitan Life Insurance Co.,* 317 U. S. 188 (1942). In two later cases, *City of Morgantown* v. *Royal Insurance Co., Ltd.,* 337 U. S. 254 (1949) and *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176 (1955), the Court was presented with a reverse situation from *Enelow-Ettelson*: the plaintiff's action was one originally cognizable in equity rather than in law. In *Morgantown* the defendant interposed a counterclaim in law, and in *Baltimore Contractors* the defendant raised an equitable defense. As a court at law could not enjoin the equitable action, and as a court of

equity would not enjoin itself, the orders below were both held non-appealable. In both cases the equity side had merely exercised its inherent power to regulate proceedings before it; no injunction had been issued.

[1784] The result of the Supreme Court's decisions is that an order granting or denying a stay of an action at law pending determination of an equitable defense or counterclaim is appealable. But if the original action is equitable *or* if the defense or counterclaim is legal, then the order is not appealable. *Schine* v. *Schine,* 367 F. 2d 685 (2 Cir. 1967). Needless to say, this anomalous result, based on historical distinctions rather than on policies relevant to the desirability of allowing interlocutory appeals, has not escaped adverse criticism. See, *e.g.,* 5 Moore, *Federal Practice* (2d ed. 1966) ¶ 39.13[2]; 75 Harv. L. Rev. 351, 371-375 (1961). The Court itself has acknowledged the "incongruity" which "springs from the persistence of outmoded procedural differentiations" but has decided to wait for Congress to make an amendment if it should choose to do so. *Baltimore Contractors, Inc.* v. *Bodinger, supra* at 184-185.

Orders by courts in admiralty granting or denying stays of proceedings before them have been spared the confusion of *Enelow-Ettelson-Morgantown-Baltimore Contractors.* Such orders have consistently been held not to be injunctions within the meaning of § 1292(a)(1) even if based on equitable defenses or counterclaims. In *Schoenamsgruber* v. *Hamburg American Line,* 294 U. S. 454 (1935), decided the same term as *Enelow,* a court in admiralty had stayed proceedings before it pending arbitration between the parties. Despite the similarity to the *Shanferoke* case, the Supreme Court held that admiralty courts had the power,

without need to resort to the aid of equity, to delay actions before them pending the outcome of some other proceeding. Such an order was not one issued by equity[9] and therefore not appealable. This court has consistently followed the [1785] holding of *Schoenamsgruber. Moran Towing & Transportation Co.* v. *United States,* 290 F. 2d 660 (2 Cir. 1961); *Solomon* v. *Bruchhausen,* 305 F. 2d 941 (2 Cir. 1962); *Lowry & Co.* v. *SS LeMoyne D'Iberville,* Docket #30662, 2 Cir. January 21, 1967 [proceedings stayed pending foreign arbitration].

Rederi now contends that *Schoenamsgruber,* and our own decisions following it, are in some fashion undercut by the unification of civil and admiralty rules which became effective July 1, 1966.[10] Syllogistically summarized its argument is:

> (1) The grant or denial of a stay of an action at law pending arbitration is appealable (*Shanferoke*).
>
> (2) After unification actions in admiralty are to be treated no differently than actions in law.
>
> (3) Therefore the grant or denial of a stay of an action in admiralty is appealable.

The difficulty lies in the second premise. The new rules make clear that actions in admiralty are *not* to be treated like actions in law in every respect (*e.g.,* right to jury trial). Rule 9(h) provides:

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[9] As an historical matter, there seems to be no reason why the chancellor would not have enjoined proceedings before courts of admiralty as well as before courts of law. See 75 Harv. L. Rev. 351 (1961).

[10] 383 U. S. 1031 (Feb. 28, 1966). We assume without deciding that the new rules apply to this appeal from an order of July 12, 1966 even though the proceedings began some two years earlier.

"A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 26(a), 38(e), 73(h), 82 and the Supplemental Rules for certain admiralty and maritime claims."

[1786] Although none of the rules referred to in Rule 9(h) deal directly with interlocutory appeals under § 1292(a)(1), the absence of such a reference does not mean the draftsmen intended to change § 1292(a)(1) in any way.[11]

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[11]With respect to § 1292(a)(3), under which most interlocutory appeals are taken, the draftsmen specified that the new rules were not to affect former practice. Rule 73(h) provides:

"These rules do not affect the appealability of interlocutory judgments in admiralty cases pursuant to Title 28, U. S. C., § 1292(a)(3). The reference in that statute to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)."

§ 1292(a)(3) provides for appealability of:

"Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

There are intimations in *Schoenamsgruber*, 294 U. S. at 458, that § 1292(a)(3) might be the exclusive route to interlocutory appeals in admiralty cases, and the Fifth Circuit seems to have adopted that position. *Stark* v. *Texas Co.*, 88 F. 2d 182 (5 Cir. 1937). However, this court has held appealable under § 1292(a)(1) orders in admiralty which did not qualify under § 1292(a)(3). *W. E. Hedger Transportation Corp.* v. *Gallotta*, 145 F. 2d 870, 871 (2 Cir. 1944); *Curtis Bay Towing Co.* v. *Tug Keven Moran, Inc.*, 159 F. 2d 273, 275 (2 Cir. 1947) and these decisions have met with favorable comment. 6 Moore, *Federal Practice*, ¶ 54.06[5] at p. 41. See also *In re World Tradeways Shipping, Ltd.*, F. 2d (2 Cir. March 15, 1967).

The *Ettelson* case teaches that the separate "sides" of the district court may survive unification for purposes of § 1292(a)(1). Since a court in admiralty had the power to stay its own proceedings without the aid of equity prior to unification, there is no reason to believe that it somehow lost that power as a result of unification.

Even if we were to bring stays in admiralty into the thicket of *Enelow-Ettelson-Morgantown-Baltimore Contractors,* it would still be necessary to decide whether to apply *Enelow-Ettelson* (appealability) or *Morgantown-Baltimore Contractors* (non-appealability). There is no need to disturb existing practice by applying *Enelow-Ettelson.* While [1787] neither of those decisions turned expressly on the right to trial by jury, both opinions mentioned that right, and it is likely that the Supreme Court was concerned in those decisions that there be a right to immediate appeal from a ruling, the effect of which might be to keep plaintiff from a jury in the event that the equitable defense or counterclaim should be decided against him. 75 Harv. L. Rev. 351, 373-374 (1961). Since there is no right to jury trial in admiralty, this concern for access to the jury is inapplicable.

Stays of the kind with which this case is concerned are merely calendar orders. They do no more than delay proceedings; in the great majority of cases they do not, in practical effect, determine substantial rights of the parties or cause irreparable harm. They demonstrate no crying need for an exception to the final judgment rule. See Moore, *Federal Practice* (2d ed. 1966) ¶ 39.13[1]. In the instant case, Rederi, the appellant, may receive satisfaction for its

indemnity claim in the arbitration proceeding.[12] If it does not, or if it receives only partial satisfaction, then it will be free to renew its *Ryan* indemnity claim in the district court. If, as the appellant argues, the *Ryan* claim against appellee, Cunard, as stevedore is independent of the time charter, then no decision or award by the arbitrator will have any effect on that claim (except to the extent that a partial award by the arbitrator would reduce the amount of indemnity to which appellant is entitled).

The appeal is dismissed.

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[12]Clause 13 of the time charter provides:

". . . The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter by improper or careless bunkering or loading, stowing, or discharging of goods or any improper or negligent act on their part or that of their servants."

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Ad. 478

BERNARDO PENORO,

Libelant,

—against—

REDERI A/B DISA and vessel DISA, her motors, engines, boilers, gear and tackles,

Respondents.

REDERI A/B DISA,

Respondent and Impleading Petitioner,

—against—

CUNARD STEAMSHIP COMPANY, LTD.,

Impleded Respondent.

MURPHY, D. J.

Cunard, the impleaded respondent, moves to stay the impleading petitioner from proceeding against it pending arbitration in London.

The libel is by a longshoreman, an employee of Cunard, against the owners of the M/V DISA and the ship for injuries sustained during the discharge of cargo in New York on October 14, 1963. Cunard, the impleaded respondent, was acting as stevedore at the time.

It is undisputed that the vessel is Swedish owned and was time chartered to Cunard pursuant to a charter exe-

cuted in London. The charter provides that the charterer (Cunard) is responsible for loading, trimming, stowing and unloading the vessel (Clause 4). It also provides (Clause 13) that the charterer (Cunard) is responsible for loss or damage caused to the vessel or to the owners by any improper or careless loading, stowing or discharging of cargo or any improper or negligent act on its part. Clause 23 provides for arbitration as follows: "Any dispute arising under the Charter to be referred to arbitration in London. . . ."

The owners of the vessel M/V DISA, who are being sued in negligence and for the unseaworthiness of the vessel by the injured longshoreman, allege in their impleading petition that if the plaintiff was injured by reason of any unseaworthy condition of the vessel such condition was caused by the fault, negligence and want of care of Cunard in violation of its warranty of workmanlike service.

We agree with Cunard and hold that the impleading petitioner should be stayed pending arbitration. Giuffre v. The Magdalene Vinnen, 152 F. Supp. 123 (E. D. N. Y. 1957); cf. Greene Steel & Wire Co. v. F. W. Hartmann & Co. 235 N. Y. S. 2d 238 (Sup. Ct. 1962), affirmed 20 A. D. 2d 683, 247 N. Y. S. 2d 1008 (2d Dept. 1964) leave to appeal denied, 14 N. Y. 2d 688, 249 N. Y. S. 2d 886 (1964).

Respondent and impleading petitioner does not dispute that a provision for foreign arbitration is enforceable in this court. It claims, however, that its claim-over against Cunard is not a dispute arising out of the charter agreement. It relies on Cunard's implied warranty as stevedore that it would perform all its operations in a workmanlike manner. Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp., 350 U. S. 124 (1956). Suing on such implied warranty, it argues, is separate and apart from any contractual provisions in the charter agreement between the

parties. We think not. The implied warranty in *Ryan*, as in Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423 (1959), Waterman S. S. Corp. v. Dugan & McNamara, 364 U. S. 421 (1960) and Italia Soc. v. Oregon Stevedoring Co., 376 U. S. 315 (1964), was based on the contractor's "breach of its purely consensual obligation *owing to the shipowner*. . . . This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract." 350 U. S. 131-33. The only contract here is the charter party. Whether American or English law controls or whether an implied warranty exists against a charterer who is acting also as stevedore it seems clear that an implied warranty of workmanlike service must be bottomed in the contract, i.e., the charter party. Under the charter party Cunard is responsible for its negligence or improper act in handling the discharge of the cargo. The claim-over is one arising under the charter agreement and any dispute must be referred to arbitration in London,

Stay granted. Settle order.

THOMAS F. MURPHY
U. S. D. J.

Dated, New York, N. Y., July 5, 1966.

SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
JUL 27 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 302

BERNARDO PENORO,

Plaintiff,

against

REDERI A/B DISA and vessel DISA, her motors, engines, boilers, gear and tackles,

Defendants.

REDERI A/B DISA,

Defendant and Third-Party Plaintiff-Petitioner,

against

CUNARD STEAMSHIP COMPANY, LTD.,

Third-Party Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 302

BERNARDO PENORO,

Plaintiff,

against

REDERI A/B DISA and vessel DISA, her motors, engines, boilers, gear and tackles,

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REDERI A/B DISA,

Defendant and Third-Party Plaintiff-Petitioner,

against

CUNARD STEAMSHIP COMPANY, LTD.,

Third-Party Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statutes Involved

In addition to 28 U.S.C. §1292(a)(1) cited by Petitioner, this case involves §3 of the Federal Arbitration Act, 9 U.S.C. §3, which authorizes the granting of a stay pending arbitration and which is set forth below in pertinent part at page 9.

ARGUMENT

I

The holding of the Court of Appeals is in no way contrary to this Court's order of July 1, 1966, effecting unification of civil and admiralty procedures.

Petitioner is flatly erroneous in contending that prior to unification, appealability of a stay under §3 of the Arbitration Act, 9 U.S.C. §3, depended on whether the action being stayed was brought under the Rules of Civil Procedure as opposed to the Admiralty Rules. Both legal and equitable actions are tried under the Civil Rules, yet a stay granted in an equitable action is *not* appealable, despite the Civil Rules. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955). Even a surface glance thus shows that application of the Civil Rules has nothing to do with appealability.

The fact that a stay of an action at law is appealable results not from any rules of procedure but rather from the fiction that a single federal district judge constitutes three separate "courts"—law, equity and admiralty—even though he holds but one appointment and sits in a single courtroom. Appellate jurisdiction under 28 U.S.C. §1292(a)(1) applies only to injunctions, and as the Court of Appeals correctly pointed out below, a stay of court proceedings can be treated as an injunction only if it is directed at proceedings in some court *other than the court issuing the stay* (Opinion, 6a). Under the "separate courts" fiction, this means that a stay issued against an action at law can be treated as an injunction if issued by the equity side of the court. However, if the stay can

be granted by the law side itself, then the order is *not* an injunction issued by one court against proceedings in *another* court. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 381-382 (1935).

In *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, decided January 7, 1935, an action on the law side of a district court had been stayed pursuant to §3 of the Arbitration Act. This Supreme Court ruled that the stay required an exercise of the court's equitable jurisdiction and was therefore appealable as an injunction. Almost simultaneously, the same bench of this Supreme Court decided *Schoenamsgruber* v. *Hamburg Line*, 294 U. S. 454 (March 4, 1935), where an action in admiralty was stayed pursuant to §3 of the Arbitration Act. The Supreme Court here ruled that the district judge had the power to issue the stay *in his capacity as a court of admiralty.* Therefore, the stay was *not* directed against proceedings in another court but rather against proceedings on the issuing court's own docket. As such, it was not an injunction under the *Enelow* doctrine and hence was not applicable.

Since a stay is treated as an injunction only if directed against proceedings in another court, the only question here is whether unification of the Civil and Admiralty Rules somehow restricted the power of an admiralty court to stay its own proceedings, so that resort to a different side of the court would be required to obtain the stay. The answer to this question, and to this petition for certiorari, is set forth plainly and unmistakably in the unified rules themselves. The Advisory Committee's Note to Supplemental Rule A flatly states that the unified rules are *not* intended to restrict the previously held powers of the admiralty side of the court:

> "* * * these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adopt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action."

This portion of the Note was added at the request of the Committee on Supreme Court Admiralty Rules of the Maritime Law Association so as to specifically prevent any inference that unification was intended to restrict the power of an admiralty court. See Record on Appeal, Affidavit of John W. Castles 3d of February 3, 1966 in support of motion to dismiss appeal for lack of jurisdiction.

Petitioner ignores all of this and rests his argument solely on the premise that Rule 65 now makes injunctive power available in admiralty proceedings. Even if this premise were true (Rule 65 does not confer injunctive power but merely regulates its use when it is otherwise available), it is wholly irrelevant. *Schoenamsgruber* held more than thirty years ago that an admiralty court had the power to stay proceedings before it. See also *Kulukundis Shipping Corp.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 987 (2nd Cir. 1942). The fact that an admiralty court may be given general injunctive power as well does not alter the fact that a stay in admiralty is issued by the admiralty court against proceedings on its own calendar, not against proceedings *in another court.* Such a stay is not an injunction. *Enelow* v. *New York Life Ins. Co., supra.* Even if the district court below, sitting in admiralty, had possessed injunctive power, the situation would be unchanged. In *Baltimore Contractors, Inc.* v.

Bodinger, supra, a stay issued by a court of equity against proceedings *on its own calendar* was not an injunction, even though the court of equity clearly possessed injunctive power.

Furthermore, the mere fact of unification of the Civil and Admiralty Rules did not remove the basic procedural and jurisdictional differences between the law and admiralty sides of the court. In fact, the new rules not only preserved these differences but did so consciously and with full intent. Under Rule 9(h), specific provision is made for claims which are within the admiralty and maritime jurisdiction, so that certain special procedures may be applied. The Advisory Committee's Note to Rule 9(h) states in part:

> "Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a cival action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. §1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of

citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

"It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly, as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory, and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear."

As Rule 9(h) points out, certain of the unified rules apply *only* to cases which are on the admiralty side of the court, namely Rules 14(c), 26(a), 38(e), 73(h), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. There is, therefore, absolutely no basis for arguing that unification was intended to remove all procedural differences between law and admiralty.

Significantly, one of the distinctions specifically preserved is the provision in 28 U.S.C. §1292(a)(3) for appeals from certain interlocutory orders in admiralty only. Rule 73(h). This fact, together wtih the general

statement in the Advisory Committee Note above—"* * * there is no disposition to change the present law as to interlocutory appeals in admiralty * * *"—specifically negates any possible inference that the mere fact of unification was intended to place interlocutory appeals in law and admiralty on a completely equivalent footing.

Furthermore, in *Baltimore Contractors, Inc.* v. *Bodinger, supra,* this Court rejected the opportunity to establish a uniform rule for appealability of stays under §3 of the Arbitration Act. This Court stated that the differences in appealability were illogical, but that at this late stage it was for Congress to provide uniformity. It is therefore highly unlikely that the Advisory Committee and this Court intended to silently provide a uniform rule through unification, in derogation of this previously expressed policy.

II

The stay of a suit in admiralty pending arbitration should not be appealable as an injunction.

As a matter of policy, this Court should not extend to admiralty cases the rule of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449 (1935), since that case improperly construed §3 of the Arbitration Act. As noted above, *Shanferoke* held that a stay of proceedings at law under §3 was similar to the stay involved in *Enelow* v. *New York Life Insurance Co., supra,* and entailed the exercise of equity jurisdiction. Unfortunately, this jurisdictional point had not been raised in the Court of Appeals, nor had it been raised in the briefs and oral argument before the Supreme Court. See 293 U. S. at 451. Had proper consideration been given, it would

have been clearly seen that a stay of legal proceedings under §3 does *not* invoke the equity jurisdiction but is rather "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it * * *." *Enelow* v. *N. Y. Life Ins. Co., supra,* at 381-382.

At common law, courts of equity would not enforce an executory agreement to arbitrate and hence would not stay proceedings at law in order to permit arbitration. This was clearly recognized by Congress when it passed the Arbitration Act:

> "* * * it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had.
>
> * * * * * *
>
> "Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules * * *." S. Rep. No. 536, 68th Cong. 1st Session, p. 2.

See also Story, *Equity Jurisprudence* §670, *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed. 1006 (S.D.N.Y. 1915), *Aktieselskabet Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten,* 232 Fed. 403, 405 (S.D.N.Y. 1916), *The Eros,* 241 Fed. 186, 191 (E.D.N.Y. 1916).

Statutory authority was required to enforce arbitration agreements, and the first English statute enabling a party to obtain a stay over the objection of another party (17

& 18 Vict. c. 125, 1854), passed when England still had separate courts of law and equity, makes it absolutely clear that the stay of an action at law was obtained from the court of law itself and not from a court of equity:

> "XI Whenever the parties to any Deed or Instrument in Writing * * * shall agree that any then existing or future Differences between them * * * shall be referred to Arbitration, and any One or more of the Parties so agreeing * * * shall nevertheless commence any Action at Law or Suit in Equity against the other Party * * * it shall be lawful for the Court *in which such Action or Suit is brought* * * *, on Application by the Defendant * * * to make a Rule or Order staying all Proceedings in such Action or suit * * *" (emphasis added).

In 1889 the Arbitration Act "amending and consolidating the Enactments relating to arbitration" was passed (52 & 53 Vict. c. 49), and the wording was changed to read as follows:

> "4. If any party to a submission * * * commences any legal proceedings in *any* court against any other party to the submission * * * with respect to any matter agreed to be referred, any party to such legal proceedings may * * * apply to *that court* to stay the proceedings * * * (emphasis added).

This English statutory scheme was the model for early arbitration acts in this country, as the previous quotation from Senate Report No. 536, 68th Cong. 1st Session, shows. Thus, the language of §3 of the federal Arbitration Act provides:

> "If any suit or proceeding be brought *in any of the courts* of the United States upon any issue referable to arbitration under an agreement in writing

> for such arbitration, the court *in which such suit is pending* * * * shall on application of one of the parties stay the trial of the action until such arbitration has been had * * *" (emphasis added).

It is therefore clear that a stay under §3 of the Arbitration Act is a "stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it * * *." *Enelow* v. *N. Y. Life Ins. Co., supra,* 381-82. As such, it should not have been treated as an injunction under the *Enelow* rule and should not be appealable under §1292(a)(1) of the Judicial Code. This was the position taken by the Supreme Court in *Schoenamsgruber* v. *Hamburg Line, supra,* with respect to suits in admiralty, and in *Baltimore Contractors, Inc.* v. *Bodinger, supra,* with respect to suits in equity. These cases were correctly decided, and they should not be overruled by extending the mistaken rule of *Shanferoke.*

Furthermore, the policy of automatic appeals as of right from stays such as this tends to undermine the Congressional policy of promoting the swift and inexpensive resolution of disputes through arbitration, as well as the general policy limiting appeals to final orders, with only specified exceptions. Discretionary appeal is available under 28 U.S.C. §1292(b) for any interlocutory orders which warrant immediate appeal. Significantly, petitioner originally attempted to appeal under §1292(b), but the Court of Appeals denied leave to appeal. No useful purpose is served by permitting additional appeal of interlocutory stays which are of insufficient merit to warrant appeal under §1292(b). The only effect would be to impose an additional burden on the parties and the courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

July 26, 1967

Respectfully submitted,

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